

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Extending Wireless Telecommunications)	WT Docket No. 99-266
Services to Tribal Lands)	
)	

To: The Commission

**COMMENTS OF
DULUTH PCS, INC., WEST VIRGINIA PCS, INC. AND
ST. JOSEPH PCS, INC., COLLECTIVELY D/B/A/ WINDSONG PCS**

Duluth PCS, Inc., West Virginia PCS, Inc. and St. Joseph PCS, Inc., collectively d/b/a/ WINDSONG PCS (“Windsong”), by its attorneys, hereby submits comments in response to the Second Further Notice of Proposed Rulemaking in this proceeding.^{1/} In support thereof, the following is respectfully shown:

I.

INTRODUCTION

The Commission requests public comment on ways to adjust its current program of granting bidding credits to winning spectrum bidders who deploy wireless facilities and provide service to federally-recognized, underserved tribal areas. In particular, the Commission seeks to adjust the current program to encourage further deployment by carriers of wireless services on tribal lands.^{2/}

¹ In the Matter of Extending Wireless Telecommunications Services to Tribal Lands, WT Docket No. 99-266, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, FCC 03-51 (rel. Mar. 14, 2003) (“*Second Report and Order*” or “*Second Further Notice*”).

² *Second Report and Order*, ¶ 3.

Windsong holds several licensees in the Personal Communications Service operating on spectrum won in the C-, D-, E- and F-Block Auctions. Through these licenses, Windsong provides mobile services to largely rural areas in Minnesota and Wisconsin that include tribal lands. Having experienced first hand the challenges of building a new system and providing economic service in sparsely populated high-cost areas, Windsong believes the Commission's tribal lands bidding credit initiative requires a more aggressive approach if it is to be successful. In particular, Windsong urges the Commission to (i) reconsider its current 70 percent threshold telephone penetration rate, which is essentially arbitrary and, in any case, far too low (ii) allow carriers to self-certify compliance in appropriate circumstances, and (iii) grant bidding credits not only to future auction participants, but to past auction participants such as Windsong who are struggling to pay off auction debt and, at the same time, expand service into tribal lands. Windsong proposes that credits be given such carriers in the form of offsets to their remaining auction installment payments, conditioned upon extending service to tribal lands.

II.

DISCUSSION

A. **The Shortcomings Of The Commission's Existing Bidding Credit Program Are More Fundamental Than Suggested By The Second Further Notice.**

The *Second Report and Order* recognizes that the tribal lands bidding credit program has been less than a glowing success.^{3/} Indeed, after 10 auctions featuring 375 winning bidders purchasing 10,479 licenses, only 27 winning bidders have indicated they would seek the bidding credit and, of those, a mere five bidders have submitted the 90-day certifications required to get the credit. Such statistics reveal a near total failure to implement the policy objective. The

³ *Second Report and Order*, ¶ 10.

problem is simple -- the tribal lands bidding credit system is overly restrictive and has the effect of discouraging active participation by interested carriers. Substantial changes to the system are required if the goal of extending wireless telecommunications services to tribal lands is to be achieved. Yet, in large measure, the remedial actions under consideration in the *Second Further Notice* amount to relatively minor tweaks of the current system.^{4/}

The tribal lands bidding credit program's basic shortcoming is that it provides insufficient incentive for wireless carriers to do what the Commission wants -- provide more wireless service to tribal lands. Several of the program revisions proposed for comment in the *Second Further Notice* -- modifying the construction requirements by giving more time to construct, extending the bidding credit to adjacent non-tribal areas, and slightly adjusting bidding credit eligibility based on 2000 Census data -- represent relatively minor adjustments to the program. Such modest steps might be adequate if the program to date had been moderately successful. But that is hardly the case. And while the Commission's proposal to increase the amount of the bidding credits holds some promise of attracting more participants, Windsong believes that more is required to energize this moribund program and to ensure increased wireless service to tribal lands. Similarly, Windsong believes that the indirect and speculative value of the Commission's proposal to permit carriers to transfer future bidding credits is unlikely to generate substantial additional interest in the program.

⁴ Although undoubtedly of practical help in providing needed additional time to negotiate with tribal governments, it can hardly be expected that the initial action taken by the Commission -- extending the certification period from 90 to 180 days -- will provide significant additional incentive for wireless carriers to seek bidding credits under the tribal lands program, or do much to invigorate the program. Indeed, had the Commission provided 180 days from the outset, it would only have enabled some of the 22 winning bidders who indicated they would seek the bidding credit but failed to submit certifications within the 90 day period to possibly file their certifications during the additional 90 day period. This is hardly a significant step towards improving the deployment of wireless services to tribal lands.

1. The Commission Should Consider Expanding The Universe Of Service Providers Eligible For Bidding Credits.

The current program is fundamentally stymied by the fact that it is directed towards too limited a universe -- that is, *future auction participants*. Potentially more fruitful among the universe of entities most likely to provide wireless service of the kind needed in tribal areas (i.e., mobile wireless telephone service), are the nation's operating cellular and PCS carriers -- carriers that already have spectrum licenses. While it might be assumed that many operating carriers would like additional spectrum, and although at least some are prospective participants in future spectrum auctions, the Commission's experience to date suggests that the nation's mobile service providers are not sufficiently incented by the prospect of getting bidding credits in future spectrum auctions to significantly expand service in tribal areas.

2. The Commission Should Extend Bidding Credits To Past Auction Winners In The Form of Direct Relief From Installment Payments.

One way to readily expand the universe of carriers participating in the tribal lands program is to allow operating wireless service providers relief from future installment payments in the amount of the bidding credit in return for extending service to tribal lands. Obviously, such relief should be available only to carriers who have been timely and are current in satisfying their auction debt through installment payments, and the relief would be contingent upon their actually extending service to tribal lands. Such a modest expansion of the program would provide a direct incentive for operating carriers to undertake the investment required for extending service to tribal lands. Based upon its own experience, Windsong believes that operating carriers currently burdened with making auction debt installment payments are likely to be more incented to provide immediate service to underserved native Americans than prospective auction winners. Further, the Commission can easily ensure that bidding credits

given in the form of relief from auction installment payments translate into actual service to tribal lands by imposing reasonable construction deadlines, suspending installment payments during the construction period, and resuming payments with interest penalties for failure to meet service deadlines.

There are well over one hundred wireless carriers currently making installment payments on previously auctioned spectrum. Offering these carriers bidding credits in the form of offsets to their installment payment obligations would create a direct, immediate and powerful incentive for them to extend service to tribal lands. Moreover, this incentive would likely be stronger than has been generated by the Commission's current program because the *benefits* of participating are more direct and tangible to carriers now making installment payments. The benefits to the public interest also would be more immediate. As operating carriers, licensees making installment payments are in a position to more quickly extend service to tribal lands than are prospective auction participants who may have yet to construct viable systems.

Granting bidding credits to already operating entities will translate into direct investment in serving tribal lands. Even apart from whether operating entities would be more motivated to take advantage of the bidding credit program, given the limited use of the bidding credit to date, why not expand the base of eligible participants to include those past auction winners that are faithfully making installment payments on auction debt?^{5/} There is no apparent reason why the program should be limited only to those that see an opportunity to serve tribal lands at the time they bid for spectrum. What if an opportunity arises to serve a tribal area that a carrier could not anticipate when it filed its long form application? Extending the bidding credit program to

⁵ Since the Commission no longer permits installment payments, the scope of this extension of the program would be definable.

carriers currently making installment payments can only add to the success of the Commission's program.

In the *Second Report and Order* the Commission concludes that it should not extend the program to already-licensed carriers at this juncture "in light of our still-limited experience with the bidding credit program."^{6/} However, the Commission's tribal lands bidding credit program was adopted almost three years ago on June 8, 2000.^{7/} It would seem, therefore, that the Commission's "still-limited experience" with the program is not a consequence of the amount of time that has elapsed, but rather the result of negligible interest and participation in the program. The latter circumstances are unlikely to change if the Commission will not consider more aggressive ways to expand interest in the tribal lands bidding credit program. Extending the bidding credit program to already licensed carriers making installment payments is a small, but significant step towards expanding the experience with the bidding credit program sufficient to generate meaningful data on the potential interest in such a program.

3. The Commission Should Allow Carriers to Self-Certify Compliance With The Bidding Credit Requirements In Appropriate Circumstances

In its Notice of Proposed Rulemaking initiating this proceeding, the Commission sought comment on whether the grant of bidding credits "should be conditioned on the existence of a binding agreement between the licensee and the relevant tribal authority."^{8/} Wisely, the Commission appears to have concluded it is unnecessary to require a binding agreement with the

⁶ *Second Report and Order*, ¶ 18.

⁷ In the Matter of Extending Wireless Telecommunications Service to Tribal Lands, WT Docket No. 99-266, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 11794 (2000). ("Report and Order").

⁸ In the Matter of Extending Wireless Telecommunications Service to Tribal Lands, WT Docket No. 99-266, *Notice of Proposed Rulemaking*, 21 CR 2069 (1999) ("NPRM"), ¶ 40.

tribal government as a condition to granting bidding credits. Instead, it determined to require that carriers provide a “certification” from the tribal government that: (1) it will allow the bidder to site facilities and provide service on its tribal lands; (2) it has not and will not enter into an exclusive contract with the applicant precluding entry by other carriers, and will not unreasonably discriminate against any carrier; and (3) its tribal land is a qualifying tribal land as defined in the Commission’s rules, i.e., areas that have a telephone penetration rate at or below 70 percent.^{9/} Most recently, in its *Second Report and Order*, the Commission has recognized the problems and delays carriers have faced in obtaining even the tribal certifications.^{10/}

The usefulness of the tribal bidding credit, and the expansion of wireless service to tribal lands, can be significantly enhanced if the Commission will allow carriers to self-certify their compliance in appropriate circumstances. For example, in some situations, it may be possible for wireless carriers to serve all or substantial portions of tribal lands from cell sites located adjacent to the tribal lands. In such cases, there is no reason to require certification that the tribal government will allow the bidder to site facilities and provide service on its tribal land. Further, the wireless carrier can certify that it has not and will not enter into an exclusive contract with the relevant tribal government just as well as the tribal government can so certify. In fact, the Commission would have more clear authority to enforce such a certification where made by a carrier than by a tribal government. Finally, there is no apparent reason that the carrier may not certify that a tribal area it proposes to serve has a telephone penetration rate at or below 70 percent, relying upon official census records or, if necessary, conducting a survey. Regardless of

⁹ *Report and Order*, ¶ 5.

¹⁰ See, *Second Report and Order*, ¶ 10 (extending time for the filing of certifications from 90 to 180 days).

whether the carrier or the tribal government submits the certification, the Commission will continue to be adequately assured that a carrier fulfills its commitments to provide service to tribal lands through the buildout requirements to which an award of bidding credits are subject.^{11/}

Accordingly, Windsong urges the Commission to consider allowing carriers to self-certify their compliance with the tribal lands bidding credit requirements, particularly in circumstances where it is not necessary to site towers on tribal lands in order to provide such service.

B. The Commission Should Re-Evaluate Its Seventy Percent Telephone Penetration Rate Requirement For Eligibility For Bidding Credits.

While concluding that it would be premature to expand the program to tribal lands with telephone penetration rates greater than 70 percent at this time, the Commission observes in the *Second Further Notice* that the 2000 census indicates that penetration rates in some tribal areas have risen above 70 percent, while still remaining below the national average. Accordingly, the Commission has asked whether it should modify the bidding credit formula so that tribal areas with penetration rates greater than 70 percent but some percentage below the national average are eligible for the credit.^{12/} Windsong submits that the 70 percent threshold is far too low and constitutes a fundamental impediment to the success of the Commission's bidding credit program.

The 2000 census data reflect that tribal telephone penetration rates have increased substantially since the 1990 census, with an estimated 67.9% of all American Indian households

¹¹ Although the Commission is considering moderating the buildout requirement, which now requires carriers taking advantage of the bidding credit to serve 75 percent of the population of the qualifying tribal lands within three years, a proposal Windsong supports, some sort of buildout requirement will continue to apply. *Second Further Notice*, ¶¶ 21-24.

¹² *Second Further Notice*, ¶ 28.

having telephone service (compared to 46.6% in 1990) and with many, if not most, tribes well over the 70% penetration rate threshold. In fact, overall tribal penetration rates are now higher than 70% in all but two states, Mississippi and Utah.^{13/} Unless the Commission intends to focus on just those two states, it must significantly raise that threshold if there is to be any hope of achieving the goal of expanding wireless service to tribal lands.

The Commission's approach is unnecessarily cautious and self defeating. As in deciding that it would be premature to extend the bidding credit program to existing carriers at this juncture, the Commission concludes it would be premature to expand the program to areas with penetration rates of greater than 70% at this time because the "program is still in its early stages and few entities have taken advantage of the bidding credit thus far."^{14/} However, there must be reasons why so few have taken advantage of the bidding credit to date. Rather than concluding that there has been too little time for the program to work, the Commission should be considering what basis, if any, there is for believing that the fundamental lack of interest in the program over the past three years will change unless the Commission takes significant steps to broaden the application of the program, and thus, its appeal to wireless carriers.

Windsong submits that a substantial re-assessment of the telephone penetration rate threshold is required. By definition, any tribal land having a telephone penetration level below the national average constitutes an underserved area. Setting a threshold penetration rate substantially below the national average not only serves to restrict the success of the Commission's program to extend wireless services to tribal lands, but fails to put service to tribal

¹³ *Telephone Subscribership on American Indian Reservation and Off-Reservation Trust Lands*, Industry Analysis and Technology Division, Wireless Competition Bureau, May 2003, Table 1.

¹⁴ *Second Report and Order*, ¶ 16.

lands on a par with the rest of the country where it belongs. At a minimum, the Commission should set penetration rates on a state-by-state basis to allow bidding credits for carriers serving American Indian reservations having penetration rates lower than the "all housing unit" penetration level for their particular state.^{15/}

III.

CONCLUSION

For the reasons above, Windsong respectfully requests that the Commission modify its tribal lands bidding credit program in accordance with the foregoing by (i) expanding the universe of service providers eligible for bidding credits to include auction winners making installment payments, (ii) allowing carriers to self-certify compliance, and (iii) increasing the threshold telephone penetration rate requirement for eligibility for bidding credits.

Respectfully submitted,

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d/b/a/ WINDSONG PCS**

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¹⁵ Windsong strongly supports the Commission's proposal to extend bidding credits to adjacent non-tribal areas that have comparably low penetration rates. *Second Further Notice*, ¶¶ 29-35.